

WHO IS THE CBI WINNER?

**An Oil-Producing City Evacuated Must Mean
a CBI Claim is Coming to Some Insurer:
the Fort McMurray Wildfires**

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EXECUTIVE SUMMARY

The Fort McMurray (Canada) wildfires are reported to have caused economic loss to those involved in the area's oil sands industry. Insurers may expect a variety of claims to arise from the disaster, including claims for Contingent Business Interruption ("CBI"), Business Interruption ("BI"), and Civil Authority coverage. Ingress/egress or Service Interruption claims are also likely to be presented. While each insurance contract is different - and without giving any legal advice¹ - we have prepared this white paper as a means to explore the potential issues related to the wildfires that may arise in the months to come.

WHAT HAPPENED?

If one looks at the pictures, videos and news accounts, one can without exaggeration say this was a fire loss of unprecedented geographic and economic proportions.

On May 1, 2016, a wildfire began near Fort McMurray in Alberta, Canada. Two days later, on May 3, the fire swept through the Fort McMurray community, destroying approximately 2,400 structures.² Evacuations began with approximately 500 residents on May 1³; by May 3, most if not all residents of Fort McMurray, which is the main center for Canada's oil sands region, were ordered to evacuate.⁴ As of early July, there still were some reported fires burning.

¹ This paper is for general informational purposes only and is not a legal opinion nor does it represent the views of any of our clients or our firm. The paper reflects our views based upon the authors' experiences. No independent fact investigation has been conducted; rather the storyline presented is based upon what appears in the press and on the internet. The authors of this white paper are not Canadian attorneys, but are admitted to several U.S. state and federal bars.

² See "Prime Minister Trudeau and Premier Notley survey fire damage," *available at* <http://www.alberta.ca/release.cfm?xID=41753BD17F51B-F493-C329-82D9034E8303A0A7>

³ See "Wildfire continues to threaten Fort McMurray neighborhood," *available at* <http://edmontonjournal.com/news/local-news/fires-threatening-fort-mcmurray>

⁴ See "Fort McMurray Blaze, Fast and Unpredictable, Keeps Firefighters at a Distance," The New York Times, 5/4/16, *available at* [http://www.nytimes.com/2016/05/05/world/americas/fort-mcmurray-canada-fire.html?version=meter+at+0&module=meter-](http://www.nytimes.com/2016/05/05/world/americas/fort-mcmurray-canada-fire.html?version=meter+at+0&module=meter-Links&pgtype=article&contentId=&mediaId=&referrer=http%3A%2F%2Fwww.nytimes.com%2F2016%2F05%2F17%2Fworld%2Famericas%2Ffort-mcmurray-canada-wildfire.html%3F%26moduleDetail%3Dsection-news-0%26action%3Dclick%26contentCollection%3DAmericas%26region%3DFooter%26module%3DMoreInSection%26)

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Fort McMurray is “the heart of Alberta’s oil sands region,”⁵ and the fire apparently affected Alberta’s oil sands ventures. Several companies shut down or reduced oil sands operations “to evacuate workers and cope with supply disruptions or smoke that interfered with operations,” resulting in a loss of up to one million barrels of crude oil per day.⁶

After the fire appeared to recede from Fort McMurray, workers were permitted back into the area to restart operations. By May 11, Royal Dutch Shell plc and Syncrude Canada had restarted limited operations and Suncor anticipated that it could ramp up production fairly quickly when it “was safe to do so.”⁷ There reportedly was some minor damage to the electrical systems, but that damage was not anticipated to stop the industry from ramping up.⁸

On May 4, Enbridge, Canada’s largest pipeline company, shut down its pipelines in and out of its Cheecham terminal located approximately 50 kilometers from Fort McMurray, affecting some 900,000 barrels per day of volume on its system, “due to the danger from the fire itself as well as upstream production outages.” The pipelines were not damaged, but some above-ground valve sites were damaged and power outages “continued to be an issue” on May 12. Enbridge was permitted limited access to its sites late on May 15 and had resumed operations at its Cheecham terminal on May 11, with other sites following, although resumption of operations at one site was dependent on the company’s ability to get permission to fly over the

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⁵ See “Wildfire Empties Fort McMurray in Alberta’s Oil Sands Region,” *The New York Times*, May 3, 2016, available at http://www.nytimes.com/2016/05/04/world/americas/wildfire-empties-fort-mcmurray-in-albertas-oil-sands-region.html?_r=0

⁶ See “Canada Oil Sands Operators to Resume Production ‘in Coming Days and Weeks’” *Nasdaq.com*, May 11, 2016, available at: <http://www.nasdaq.com/article/canada-oil-sands-operators-to-resume-production-in-coming-days-and-weeks-canada-oil-sands-operator-20160511-00040>

⁷ See “Canada energy industry lays out a recovery strategy in Fort McMurray,” *The Globe and Mail*, May 11, 2016, available at: <http://www.bnn.ca/News/2016/5/11/Canadas-energy-industry-lays-out-a-recovery-strategy-from-a-crisis-like-none-other-in-Fort-McMurray.aspx>

⁸ Id.

right-of-way corridor.⁹ On May 16, a wildfire had reached within one kilometer of its Cheecham terminal location, but some pipelines remained in operation.¹⁰

May 16, 2016 Evacuations of Oil Sands Camps

On May 16, “[s]hifting winds turned Alberta’s huge wildfire back toward Fort McMurray . . . menacing the city once more and prompting new evacuations as the out-of-control blaze headed for two major oil sands projects north of the city.” As the fire shifted directions once again, between 500 to 600 people were evacuated from four small work camps. Additionally, for precautionary reasons, “an unknown number of employees at Syncrude and Suncor, two of the largest and oldest oil sands projects, were sent to camps further north.”

On May 16, about 4,000 people had been working “in the area at strip mines, processing plants and other operations owned by the two companies.”¹¹ Oil sands facilities and work camps located north of Fort McMurray were ordered to evacuate on May 16; nineteen work camps and as many as 8,000 people were affected by this evacuation order.¹² Just hours after the evacuations, the fires apparently destroyed the Horizon North Logistics camp.¹³

Return of Workers to Oil Sands Camps and Residents to Fort McMurray

In total, approximately 90,000 people were reported as having been evacuated from Fort McMurray and certain oil sands camps.¹⁴ On May 21, 2016, the evacuation order had been lifted for seven of the camps; by May 23, the mandatory evacuation order was rescinded for the

⁹ Id.

¹⁰ See “Oil sand work camps evacuated as Alberta wildfire moves north,” Reuters, May 17, 2016, *available at*: <http://uk.reuters.com/article/uk-canada-wildfire-enbridge-idUKKCN0Y729S>

¹¹ Id.

¹² “Fort McMurray fire, More evacuations ordered as blaze heads northward,” The Globe and Mail, May 17, 2016, *available at* <http://www.theglobeandmail.com/news/alberta/the-fort-mcmurray-disaster-read-the-latest-tuesday2/article29930041/>

¹³ See “Alberta wildfire destroys oil sands work camp as thousands of staff evacuated,” The Guardian, May 17, 2016, *available at*: <http://www.theguardian.com/world/2016/may/18/alberta-wildfire-work-camp-destroyed-evacuated>

¹⁴ See “Fort McMurray evacuation orders lifted as some workers and residents return,” The Guardian, May 21, 2016, *available at*: <http://www.theguardian.com/world/2016/may/21/fort-mcmurray-evacuation-orders-lifted-residents-return>

remaining camps.¹⁵ Residents in certain communities in Fort McMurray were permitted to begin returning in phases between June 1 to June 4.¹⁶ As of June 5, 2016, the fire was nearly 58 percent contained and was estimated to cover 581,695 hectares in both Alberta and Saskatchewan; the Fort McMurray wildfire was reportedly still “out of control” at that time.¹⁷

Estimated Economic Ramifications

As of May 26, 2016, analysts estimated that “overall insured losses” could reach approximately \$7 billion Canadian.¹⁸ Some analysts estimated that the wildfires were costing oil companies as much as \$50 million a day in lost production.¹⁹

On May 17, 2016, a local newspaper reported that “[a] new assessment of the economic impact of the Fort McMurray wildfires says close to \$1 billion of oil sands production has been lost.”²⁰ According to the Conference Board of Canada, the fire resulted in an estimated loss of “1.2 million barrels of oil per day for two weeks, translating into \$985 million in lost gross domestic profit,” which “represents about 0.33 per cent of Alberta’s projected GDP this year and 0.06 per cent of Canada’s projected GDP.” Id.²¹ This estimated loss was based on the statement that “[t]welve oilsands operations were shut down and several more curtailed output this month

¹⁵ “Evacuation order lifted for all Fort McMurray oilsands camps” CBC News, May 23, 2016, available at: <http://www.cbc.ca/news/canada/edmonton/evacuation-order-lifted-for-all-fort-mcmurray-oilsands-camps-1.3596579>

¹⁶ “Timeline of evacuation and return to Fort McMurray,” Edmonton Journal, May 28, 2016, available at: <http://edmontonjournal.com/news/insight/timeline-of-evacuation-and-return-to-fort-mcmurray>

¹⁷ See “Update 34: 2016 Wildfires (June 5 at 3 p.m.),” available at: <http://www.alberta.ca/release.cfm?xID=41701E7ECBE35-AD48-5793-1642C499FF0DE4CF>

¹⁸ See “Alberta wildfire singes companies beyond energy sector.” Today, May 26, 2016, available at: <http://www.todayonline.com/world/alberta-wildfire-singes-companies-beyond-energy-sector>

¹⁹ See “Oil sands cos losing up to \$50 million a day as fires rage – analysts” Yahoo Finance, May 20, 2016, available at: <http://uk.finance.yahoo.com/news/oil-sands-cos-losing-50-204440141.html>; last visited: June 6, 2016.

²⁰ See “Nearly \$1B of oilsands production lost due to Fort McMurray fire: report,” Edmonton Sun, May 17, 2016, available at <http://www.edmontonsun.com/2016/05/17/nearly-1b-of-oilsands-production-lost-due-to-fort-mcmurray-fire-report>; see also “Alberta Plans reentry to oil-sands town ravaged by wildfires,” Chicago Tribune, May 19, 2016, available at: <http://www.chicagotribune.com/news/sns-wp-blm-canada-fire-326ffa3a-1ddd-11e6-82c2-a7dcb313287d-20160519-story.html>; last visited: June 6, 2016.

²¹ See also “Wildfire losses mount as adjusters stand by” Business Insurance, May 22, 2016, available at: <http://www.businessinsurance.com/article/20160522/NEWS06/305229985/wildfires-oil-sands-fort-mcmurray-alberta-canada-insured-losses?tags=%7c64%7c76%7c81%7c302>; last visited: June 6, 2016.

because of the wildfire that closed pipelines and forced the evacuation of more than 80,000 people from the area.” Id.²² These numbers were based on the assumption that most oil sands operations would be active again by the end of May,²³ but the projections were made before the fire shifted back in the direction of Fort McMurray.

By June 11, 2016, it had been estimated that the cumulative production loss from the wildfires would reach approximately 40 million barrels, although the exact cost of that loss was difficult to ascertain.²⁴ Wildfires were still burning and were causing additional isolated evacuations.²⁵ As of July 1, 2016, approximately 350,000 barrels per day of production were still offline at the joint venture Syncrude project and Suncor Energy’s Mackay River thermal plant.²⁶

Other industries affected by the wildfires and shutdown of the oil sands operations reportedly include rail and hospitality.²⁷

WHAT ARE THE KEY ISSUES ARISING IN THE WAKE OF THIS FIRE?

Given these press reports, the full extent of loss will not be known for some time. One anticipates that insureds in both Canada and the United States may submit first-party property damage claims as a result of the fire.

²² This number is perhaps less than it would have been had the fire occurred before last year, when “[t]he collapse of oil prices . . . hit the city [of Fort McMurray particularly hard.]” While no major oil sands projects have been shut down as a result of the collapse of oil prices, oil sands companies have been laying off workers as projects are completed. See “Wildfire Empties Fort McMurray in Alberta’s Oil Sands Region,” The New York Times, May 3, 2016, available at http://www.nytimes.com/2016/05/04/world/americas/wildfire-empties-fort-mcmurray-in-albertas-oil-sands-region.html?_r=0

²³ See “Nearly \$1B of oilsands production lose due to Fort McMurray fire: report,” Edmonton Sun, May 17, 2016, available at <http://www.edmontonsun.com/2016/05/17/nearly-1b-of-oilsands-production-lost-due-to-fort-mcmurray-fire-report>

²⁴ See “Tallying Alberta’s oil revenue loss from Fort McMurray wildfires,” CBC News, June 11, 2016. Available at: <http://www.cbc.ca/news/canada/calgary/wildfire-alberta-fortmcmurray-royalties-1.3622811>

²⁵ Id.

²⁶ See “Factbox-Oil sands production shuttered by Alberta wildfires” Reuters, July 1, 2016. Available at: <http://in.reuters.com/article/canada-wildfire-oil-idINL1N19M2CA>

²⁷ See “Alberta wildfire singes companies beyond energy sector,” supra.

Today, more than ever, the insurance industry is global in its reach. Many of the policies issued to insureds headquartered in the United States provide coverage for loss or damage at insured locations across the world. Therefore, just limiting our thoughts to the United States, claims for this Canadian event are likely to be submitted to insurers based in the United States.

The wildfires may have an effect on businesses around the world that depend on delivery of oil from Fort McMurray, and this may lead to claims under CBI coverage. The availability of such coverage will require a careful review of the applicable policy language, including whether the supplier was located in a covered territory; whether the supplier sustained direct physical loss or damage; whether that direct physical loss or damage was the result of a covered cause of loss; and whether the supplier was a direct or indirect vendor to the insured.

Without speculating too much, the discussion below examines the critical issues that insurers are likely to face when adjusting first-party claims arising out of the wildfires over the next several months. To the extent available, we mention Canadian case law, though again we are not providing legal advice.

ANALYSIS

I. CONTINGENT BUSINESS INTERRUPTION

One of the principal effects of the Canadian wildfires on U.S.-based businesses will probably be the loss of income resulting from the suspension of their Canadian suppliers' and customers' operations, including companies that do not own properties in the Fort McMurray area. Both Canadian and U.S. insureds will likely rely on CBI provisions in seeking coverage for business interruptions that may follow in the wake of the wildfires, which have disrupted the supply of oil.

As compared to BI coverage, case law interpreting CBI coverage is relatively scarce and not all policies include CBI coverage. When policies do include CBI provisions, the wording for CBI coverage will often be skeletal, or the coverage may be created by nothing more than a “sublimit” reference or an endorsement that focuses on listing the contingent properties that are covered. It is critical, therefore, for insurers adjusting claims arising from the wildfires to review their policies carefully.

The concept of CBI coverage is simple to express, but difficult to apply in view of the many different wordings one finds in policies. CBI extends time element coverage to situations in which the insured suffers a loss of income because of damage to someone else’s property. A CBI clause found in some ISO policies provides:

We will pay for the actual loss of Business Income you sustain due to the necessary suspension of your operations during the “period of restoration.” The suspension must be caused by the direct physical loss of or damage to “dependent property” at a premises described in the Schedule caused by or resulting from any Covered Cause of Loss.

Thus, under this provision, for CBI coverage to apply there must be: 1) a necessary interruption of the insured’s business; 2) resulting from direct physical loss or damage caused by a covered cause of loss; 3) where the direct physical loss or damage is to property of a type insurable under the policy; and 4) the direct physical loss or damage must prevent a supplier (or receiver) of goods or services from providing (or receiving) those goods or services. CBI coverage²⁸ is usually limited to a Period of Recovery, typically ending when the supplier’s damaged property could have been rebuilt, repaired, or replaced with due diligence and dispatch.

²⁸ Each policy has different terms and limitations, which make it difficult to capture in any academic paper the full panoply of variations, which would yield different results.

A. Definition of a “Supplier”

Usually, CBI provisions require damage to the property of a “supplier” or “customer.” Very little case law discusses the meaning of a “customer,” but several courts have addressed the meaning of “supplier.”

In one preeminent case, the insured was a processor of farm products. Flooding of farmland on the banks of the Mississippi caused some of the farmers who supplied the insured with grain to suspend operations. Damage to the property of the Army Corps of Engineers (“Corps”) prevented the Corps from keeping the Mississippi navigable, which increased the insured’s transportation costs.

That court defined “supplier” as “an unrestricted group of those who furnish what is needed or desired.” The court agreed with the insured that the Corps was a “supplier” to the insured inasmuch as the Corps’s construction of physical improvements on the Mississippi River was a “service” that it provided to the insured despite the absence of a contract between the Corps and the insured. The court further ruled that the local farmers were “suppliers” to the insured, even though the insured purchased the grain from intermediary grain dealers. The policy, it observed, did not limit the CBI coverage to “direct” suppliers. The court concluded that if the insurer had wanted to limit CBI coverage to “direct” suppliers, it could have included wording to that effect.

A Canadian court reached a similar conclusion, holding that where the insurance policy covers interruptions caused by property damage to facilities used by a supplier to obtain product for an insured, there is no requirement that the supplier actually own the facilities. A court in Alberta stated that “[f]acilities of suppliers’ would commonly be understood to include facilities used for the purpose of providing supply to an insured irrespective of whether the supplier

owned the facilities.” “Supplier” in that case was defined in part as “an entity not owned or operated by the insured that delivers goods or services.” While the Alberta court did not expressly discuss the issue in terms of whether there was coverage for “direct” or “indirect” suppliers, it generally agreed with the rationale provided by the trial court, which had held that “[d]rawing a distinction between direct and indirect suppliers would lead to an absurd result.”

Even where an insurer did specify that CBI coverage would apply only to “direct suppliers,” one New York federal court held that the term could reasonably be construed to include subsidiary or sister companies of the insured.

While we have seen some courts take a broad view of what is meant by a supplier, courts will impose some limitations. For example, where the insured was a manufacturer, and the alleged “supplier” was a substation that provided electric power to a Taiwanese factory that supplied products to the insured, the court held that “the power substation [is] not a ‘supplier of goods and/or services’ to [the insured] within the plain meaning of [the policy wording].” The court noted that the substation at issue supplied power to the factory but “supplied no goods or services to [the insured], directly or indirectly.”

Another U.S. Court of Appeals recently rejected one insured’s attempt to conflate a direct supplier with an indirect supplier. In that case, the appellate court dismissed the insured’s argument that a natural gas producer could qualify as a direct supplier (or direct contributing property, as stated in the policy in that case) because gas flowed through a pipeline directly from the gas producer to the insured, even though the insured did not have a direct contractual relationship with the gas producer. In reaching its holding, that court held that the term “direct” was unambiguous and meant that for the gas producer to be considered a direct contributing

property, it must have supplied the insured “with materials necessary to the operation of its business ‘without deviation or interruption’ from ‘an intermediary,’” which the producer did not.

A California federal court recently reached a similar holding, holding that a hard drive supplier that manufactured hard drives incorporated into products manufactured by another supplier was not a “direct supplier.” Although the hard drives were manufactured to the insured’s specifications, the insured did not receive components directly from or have any contract with the hard drive manufacturer.

In sum, where a CBI provision does not define or limit “supplier,” courts have construed these terms broadly. Nevertheless, the insured must still show that there is a relationship between it and the property that was damaged, such that the insured would suffer a direct pecuniary loss if the property were damaged.

B. The Requirement of Direct Physical Loss to a Supplier’s Property

CBI coverage exists when the supplier suffers direct physical damage to its property as a result of the type of peril that is covered by the insured’s policy.

The “direct physical damage” requirement is described in more detail in the Business Interruption discussion below. In the CBI context, the requirement was central to one court’s decision in a case where the insured was in the business of operating trade shows. It was covered by a CBI provision that extended its BI coverage to “loss . . . resulting from direct physical loss or damage insured by this policy occurring at each supplier and customer location(s).” The insured suffered a loss of income when one of its trade shows, at Manhattan’s Javits Center, was postponed because the Javits Center was being used for disaster relief operations related to the September 11, 2001 terrorist attacks. The court held that this loss of

income was not covered by CBI, because the Javits Center did not itself suffer direct physical loss or damage.

In sum, as in the BI context as discussed below, if required by the policy, there must be actual physical loss or damage to the supplier's property. This may be an issue with respect to the wildfires, to the extent that companies either voluntarily evacuated employees or their employees were mandatorily evacuated, and the plants were shut down for that reason, as opposed to a shutdown caused by physical damage to a supplier or customer of the insured.

C. The Requirement that the Damage Result from a Covered Peril

CBI coverage further requires that the damage to the supplier's property result from a covered peril. For example, in one case, the insured manufactured steel, for which it required a steady supply of carbon coke, but its principal supplier of carbon coke suspended sales following a fire that was caused by a series of mine explosions. At issue was whether the damage to the supplier's property was damage "of the type insured" by the insured's policy. Because that policy excluded "underground mines or mine shafts," the court found that the damage to the supplier's operations was not of the type covered by the insured's policy. Therefore, CBI coverage did not apply.

A recent Arkansas federal court considered whether the insured was entitled to coverage under a CBI provision affording coverage for "loss resulting from damage to or destruction by causes of loss insured against, to . . . property that wholly or partially prevents any direct supplier of goods and/or services to the Insured from rendering their goods and/or services." Although the property suffered physical damage, the court denied the insurer's motion for summary judgment because there existed a genuine issue of material fact as to whether the rupture of the pipeline, or the pipeline owner's decision to test the ruptured pipeline, was the dominant cause of the

insured's loss. Therefore, the mere existence of physical damage was not, in itself, sufficient to trigger the policy; the cause of the damage would determine whether the loss was covered under the policy.

In this regard, policies under which U.S. or Canadian companies will seek CBI coverage may contain pertinent exclusions, all of which should be carefully reviewed. While insureds whose CBI claims are affected by those exclusions will likely contend that the excluded peril is not the cause, or not the legally relevant cause, of the supplier's damage, this will usually be a fact-specific inquiry.

D. Causation

Generally, to recover under a CBI provision, the insured must show that its losses were caused by physical damage to a customer or supplier or by physical damage that prevented the flow of goods or services to or from the insured, depending upon the wording of the coverage provision. As one court explained, the "causation requirement is a fundamental aspect of an insurance policy because it allows an insurer to 'have a reasonably defined universe of possibilities to which it can apply its risk analysis methods . . . and to determine a premium.'" Thus, courts have held that the insured's burden includes demonstrating that its time element loss was caused by the alleged damage.

We have seen insureds argue that they do not actually have to identify what caused their losses, especially where they have a wide variety of suppliers or customers that are affected for various reasons by a large catastrophe. While courts generally have found that speculative theories and a generalized loss of revenue are insufficient to meet an insured's burden, a recent decision suggests that in that jurisdiction it may not be necessary to prove losses on a supplier-by-supplier, or customer-by-customer, basis.

One New Jersey appellate court rejected arguments by the insured that it did not have to identify an actual supplier or customer that was prevented from accepting or receiving goods or services from the insured. The policy wording in that case was broader than many CBI provisions such as the one discussed above, and it provided coverage for:

the actual loss sustained by the Insured resulting from the necessary interruption of the business conducted by the Insured, . . . caused by . . . damage . . . to:

Property that directly or indirectly prevents a supplier of goods, services or information to the Insured from rendering their goods, services or information or property that directly or indirectly prevents a receiver of goods, services or information from the Insured from accepting or receiving the Insured's goods, services or information.

The court rejected the insured's position that it was entitled to coverage because the September 11 attack caused property damage, there was a resulting economic downturn, and its lost revenue was therefore caused by property damage on September 11. The court explained that, in order for the insured to survive summary judgment, it must have presented evidence to allow a fact finder to find that the claimed business loss was caused by damage to property that prevented a customer from accepting or receiving its services. The court rejected the insured's argument that such prerequisites to coverage could be inferred from its generalized revenue shortfall. The court held that the insured could not avoid summary judgment because it had not introduced competent, credible evidence that its losses were caused by damage to property that prevented the flow of goods or services.

A Texas appellate court reached a similar conclusion in the context of a business interruption provision. There, the owner of a nationwide chain of hotels sued its insurers for \$66 million in business interruption damages, claiming that the federal no-fly orders in the days following the September 11 terrorist attack, "and the significantly increased travel security measures, along with the reaction of the world's population, caused reservations to be cancelled

and inhibited the public from using its 163 hotel and resort properties for at least the balance of September and October 2001.”

The insured’s only evidence in support of its theory was that its occupancy rate was lower during the period at issue. It did not attempt to show that the decline was the result of the air restrictions as opposed to other economic and cultural factors. As a result, the court found the insured’s business interruption theory to be “little more than speculation.”

A Louisiana appellate court, on the other hand, held that the insured was not required to prove its loss on a customer-by-customer basis, but rather needed only “to prove its business interruption losses with ‘reasonable certainty.’ Proof of such losses need only be as precise as circumstances in a particular situation allow. Broad latitude is given in proving lost profits because this element of damages is often difficult to prove and mathematical certainty or precision is not required.” It is somewhat unclear from the court’s decision whether this analysis applied only to the insured’s business interruption losses or also to its contingent business interruption losses.

Regardless, the Louisiana appellate court appears to apply a somewhat more lenient standard in the insured’s favor than the courts in New Jersey and Texas, as it suggests that an insured may be entitled to coverage if it can demonstrate that there was damage to a supplier and that the insured experienced a loss of revenue, even if the insured cannot clearly connect the loss of revenue to the damage to the supplier.

E. The Requirement that the Insured’s Operations Be Suspended

Typically, CBI coverage requires that the loss of supply cause the insured to suspend its operations. In other words, here, the loss of oil that would typically be supplied by the Canadian oil sands must cause the insured to suspend its operations. However, an Alberta case addressing

this issue held that there was coverage under a CBI provision for the period of time when the insured operated at a reduced capacity that preceded a complete shutdown of the insured's operations. In that case, on January 27, 1999 the facility that generated butane gas supplied to the insured was damaged in an explosion. In February and March 1999, two of the insured's butane suppliers reduced the amount of gas supplied to the insured to approximately half of the amount required under the contracts. Beginning on February 16, 1999, the plant operated at approximately 75% capacity and the plant was shut down for ten days beginning on March 12, 1999.

The CBI provision at issue in that case stated that coverage was provided when there was an "interruption of business," as opposed to a "necessary interruption." In holding that coverage was provided once the insured began to curtail its production, the court did not discuss the meaning of "interruption" or why coverage was provided both during the curtailment and once the insured's operations were shut down.

F. The Requirement of Actual Loss of Income

Finally, an insured claiming CBI coverage must show that the interruption of its supplier's business caused it a loss of income. It therefore must demonstrate (a) that it was unable to obtain the relevant goods or services from another source; and (b) if it was unable to do so, that the lack of those goods or services caused its business to be suspended. In this regard, oil may be available from other sources.

G. CBI Provisions Requiring that Property Damage Prevent a Supplier or Customer from Accepting or Rendering Goods or Services

We have seen some variations on the CBI provision that do not expressly require that there be damage to the property of the supplier, but rather state that there would be coverage if

covered property damage “prevents” a supplier of goods and/or services from rendering its goods and/or services.

There is limited case law addressing the parameters of coverage afforded under such provisions, particularly with respect to what type of property damage would provide a sufficient basis for coverage and what is meant for a supplier or customer to be “prevented” from rendering or accepting goods and services.

The issue of whether there must be damage to property of a supplier or customer under this alternative wording could be relevant for losses submitted by companies whose suppliers were not themselves damaged but nevertheless shut down, for example, because of a mandatory evacuation. Coverage will depend on the specific policy wording at issue as well as the facts of each particular claim.

II. OTHER TIME ELEMENT COVERAGES

Insureds that actually own properties in the Fort McMurray area are likely to present a variety of other time element coverage claims, including those discussed below.

A. Business Interruption

U.S. and Canadian insureds with affected operations in Canada may make claims for the interruption of those operations as a result of damage the wildfires caused to their own property. Generally, to recover for business interruption, the insured must demonstrate that: 1) there was direct physical loss of or damage to covered property by a covered peril; 2) its interruption of business was caused by physical loss of or damage to covered property; 3) the physical loss or damage was to covered property “at the described premises”; 4) there was a “necessary suspension of ‘operations’”; and 5) there was monetary loss that is a direct result of the “necessary suspension of ‘operations.’”

1. Direct Physical Loss or Damage

Business interruption coverage is intended to indemnify an insured for a loss of income caused by damage to covered property that interferes with the insured's ability to generate income from that property. Therefore, coverage under business interruption provisions generally exists only when physical loss or damage to insured property results in the interruption of the insured's business. Courts in both the United States and Canada generally deny business interruption claims that are not based on actual and direct physical loss or damage to insured property.

While honoring the principle that physical loss or damage to insured property is a prerequisite for a business interruption claim, some courts addressing this issue following the 2005 Gulf Coast hurricanes found coverage even though the lost revenue seemingly was not directly caused by damage directly resulting from the hurricane itself.

In sum, we believe that insureds asserting business interruption resulting from the wildfires will need to prove physical loss or damage to their property, though courts may be flexible as to whether that loss or damage must be directly caused by the fire itself.

Some insureds seek to circumvent the physical damage requirement by arguing that "loss of use" of their facilities qualifies as a type of physical loss or damage. Courts generally reject such arguments, although one United States Court of Appeals suggested that loss of use may be sufficient to establish coverage where a building was rendered unusable, even though the insured's offices within the building were not actually damaged.

Whether loss of use is sufficient for an insured to invoke business interruption coverage will be key, as many of the oil sands operations did not experience damage but rather were shut down because of potential damage and/or because their personnel were evacuated.

2. Causation

The next requirement for BI coverage is that the insured demonstrate a causal connection between the physical damage to insured property and the suspension of the insured's business. Thus, the insured will need to demonstrate that any loss of business income was the result of a suspension of its operations caused by that physical damage and not of the general social and economic disruption that accompanies a disaster. Business interruption coverage will not exist for a business that is prevented from operating by the wildfires' far-reaching effects if the interruption was not caused by that insured's property damage.

3. “At the Described Premises”

Unlike other time element extensions, such as contingent business interruption coverage, business interruption coverage requires that the physical loss or damage resulting in the suspension of operations occur “at the described premises.”

Courts have rejected arguments that insureds can claim business interruption losses where an entire industry is affected by a loss but there is no physical damage to the insured's own property. One court, for example, concluded that, in order to be compensable, “the BI/EE losses must have a causal connection to the physical damage that impacted the operations at [the insured's premises].”

However, another court has held that, if the suspension of business occurs at the described premises, and the required physical damage occurs at the described premises, the insured may be able to recover for losses from off-premises business activities.

Insureds claiming business interruption losses arising from the Canadian wildfires will need to prove that those losses occurred at the “described premises,” though if the suspension

and the physical damage occur at the described premises, it is possible that losses from that business's activities elsewhere will be covered.

4. Total versus Partial Suspension of Operations

Business Interruption insurance typically requires a “necessary suspension” (sometimes, “necessary interruption”) of operations. Many courts have held that this provision requires a complete cessation of business operations, as opposed to a mere decrease in customers, attendance, or sales. However, some courts have held that a partial cessation of business operations is sufficient, especially when the insured's business consists of discrete parts only some of which are prevented from operating.

Thus, most courts require that an insured prove that it sustained a “complete cessation” of its business (as opposed to a general slowdown in sales, customers, attendance, etc.) that caused a loss in revenue. Fewer customers or a drop in revenue will not constitute a covered business interruption claim if the business is capable of operating.

5. Actual Loss Sustained

The last requirement for business interruption coverage is that the insured suffer a monetary loss that is a direct result of the covered interruption of business. Generally, business interruption provisions contain guidelines for how to measure the “actual loss sustained” by the insured.

In some situations, insurers have a reasonable argument that if a business experiences higher than normal sales after it resumes operations, and if those higher sales are attributable at least in part to the event that caused the suspension, those gains should be considered an offset or “makeup” against any profits lost during the suspension, although courts have reached somewhat conflicting conclusions on this issue. Accordingly, insurers adjusting business interruption

damages from suspended operations as a result of the wildfires will need to determine if any claimed lost revenue should be offset by increased net profits resulting from increased demand in the affected area.

6. Change in Market

Many policies provide that, in determining the measure of the insured's business interruption loss, "due consideration shall be given to the experience of the business before the date of the damage or destruction and to the probable experience thereafter had no loss occurred." Several courts have held that "had no loss occurred" means "had the peril not occurred." Therefore, the lost profits to which the insured is entitled should be based on market conditions that preceded the peril, and should not take into account any projected increases in revenue as a result of changes in the market created by the peril itself. Courts have reached different results, often because of variations in the applicable policy wording.

B. Civil Authority

Canadian authorities have issued, and continue to issue, orders and other advisories that have affected access to the oil sands. Insureds likely will point to these orders and advisories when submitting claims under a policy's Civil Authority provision.

A Civil Authority provision may read:

We will pay for the actual loss of "business income" you sustain and necessary Extra Expense caused by action of civil authority that prohibits access to the "described premises" due to direct physical loss of or damage to property, other than at the "described premises," caused by or resulting from any Covered Cause of Loss.

Accordingly, for there to be Civil Authority coverage, four basic requirements must be met: 1) there must be an action by a civil authority; 2) that action must prohibit access to the insured's property; 3) the action of civil authority must be "due to direct physical loss of or

damage to property, other than the ‘described premises’”; and 4) the direct physical loss or damage must be caused by a covered cause of loss.

1. Access Be Prohibited

A key requirement under this provision is that “access” to the insured’s property be “prohibited” by the “action.” Courts usually strictly interpret the requirement that the order of civil authority “prohibit” access to the insured’s property. A mere difficulty in accessing the premises is generally insufficient to meet the requirement for a prohibition.

Some policies use the word “impaired” instead of “prohibited.” Insureds have argued that if the policy requires only that access to the insured premises be impaired, then the traditional requirements for coverage are less stringent.

2. Direct Physical Loss or Damage

Another part of some of the civil authority wordings we have seen requires that the action of the civil authority prohibiting access be “due to direct physical loss of or damage to property . . . caused by or resulting from a Covered Cause of Loss.” The wording of this provision does not require that the insured’s property suffer physical loss or damage. Indeed, it is designed to cover situations where the insured’s property is not damaged. We have seen insureds argue that coverage should be provided even when an order was issued in anticipation of a storm, prior to its causing any physical damage in the vicinity of the insured, or when an order only indirectly affected the insured. Such arguments are particularly common in the hospitality and gambling industry, where customers might cancel trips because they do not want to travel to an area that has been or is about to be affected by a catastrophe (real or imagined) or customers defer trips because of flight or train disruptions, delays, or cancellations. While all efforts should be made to find coverage where it exists, insurers reasonably need to give such contentions close scrutiny.

Many courts have disallowed insureds' contentions that fear of what might happen in the immediate future or inconvenience or general concern for safety automatically yield coverage.

Courts interpreting Civil Authority provisions typically uphold the requirement that the order be the result of physical damage, particularly where provisions require that the order be issued as the result of physical damage within a certain distance of an insured location. Courts have similarly held that there is no coverage where the orders at issue were made in anticipation of future events, although we are aware of one court that held that the threat of physical damage was sufficient to find coverage.

Some Civil Authority provisions are more broadly written, in that they require only that the order prohibiting access be "a direct result of a peril insured against" rather than "due to direct physical loss of or damage to property." Insureds have pointed to such broader language to contend this does not require that the peril result in any physical damage or harm: An order directly resulting from an insured peril might create coverage even when there is no physical damage or loss caused by the peril. It remains to be seen if there are any policies in force for the Fort McMurray situation having this broad type of civil authority language that would allow an insured to convince a court that a civil authority order issued because of the threat posed by the fire was "a result of a peril insured against."

3. Covered Cause of Loss

Finally, a Civil Authority provision usually provides that physical loss or damage must be caused by a "Covered Cause of Loss." The specific civil authority orders relied upon by the insured must be analyzed to determine exactly what cause or causes motivated them. Determining whether this requirement is met will necessitate an understanding of the reasons behind the order.

C. Ingress/Egress

Unlike Civil Authority provisions, some Ingress/egress provisions provide coverage in the event of a physical prohibition of access to or from an insured's premises regardless of whether there was some order/action of a civil authority.

On the basis of the wide spread of the fire, insureds will almost certainly contend that they physically were unable to gain access to their premises at various times. This type of provision generally has three basic requirements that must be satisfied in order for coverage to be available: 1) access to the insured's premises must be prevented by 2) physical loss or damage 3) caused by a "Covered Cause of Loss." Once again, the policy's coverage provisions and exclusions must be analyzed to determine if the damage was caused by a covered peril.

Evidence showing that some of the insured's employees were able to access the worksite usually means this provision is inapplicable. However, one court gave consideration as to whether access to the insured premises could be gained only through "extraordinary" efforts, and granted the insured's plea for coverage.

D. Service Interruption

1. Coverage

Some policies also contain coverage for property damage resulting from off-premises service interruption. Such provisions usually grant coverage for direct physical loss or damage to covered property caused by or resulting from an interruption of utility supply. These provisions require that the service interruption result from direct physical loss or damage by a covered peril to specified utility service equipment - such as generator plants, transformers, transmission lines,

etc. - away from the insured's premises. Thus, a power failure, in the absence of physical damage to the utility's property caused by a covered peril, will not create coverage.

2. Exclusions

Whereas some policies provide coverage for damage to covered property caused by service interruption, others exclude it. These exclusions, like the coverage extensions for service interruption, commonly require that the power failure occur away from the "described premises."

Courts generally enforce such exclusions, though some courts may stretch the definition of "described premises," or find coverage for loss or damage related to a power failure, by holding that the loss was "caused" by the covered peril or constituted an "ensuing loss."

CONCLUSION

What makes the Fort McMurray situation unique is the aggregation of so many oil-related entities in a relatively small geographic area with an almost encircling conflagration causing population and business evacuation. CBI and other time element claims likely will be presented by insureds in Canada and in the United States located in areas far beyond the relatively contained area where the wildfires occurred in addition to the various time element claims that will probably be presented by insureds with properties located in areas directly affected by the wildfires.

Navigating such claims in the wildfire context of this important Canadian city will require skill and patience. May the winds be at your back and may you not get burned!